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10 Attorneys for Non-Party Nintendo of America Inc.

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 FEDERAL TRADE COMMISSION

15 Plaintiff,

16 v.

17 MICROSOFT CORPORATION,

18 and

19 ACTIVISION BLIZZARD, INC.,

20 Defendants.

Case No. 23-cv-02880-JSC

**NON-PARTY NINTENDO OF AMERICA
INC. STATEMENT PURSUANT TO
LOCAL RULE 79-5(f) AS TO WHY ANY
PORTIONS OF VIDEORECORDED
TESTIMONY FROM PX7065 SHOULD
BE KEPT UNDER SEAL AND *IN
CAMERA***

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1 Pursuant to N.D. Cal. Civil Local Rule 79-5, Non-Party Nintendo of America Inc.
 2 (“NOA”) hereby submits this Statement as to why the portions of the videorecorded deposition
 3 transcript (PX7065) designated by the parties to be played at the evidentiary hearing are NOA’s
 4 confidential information that should be kept under seal and viewed and listened to by the Court
 5 *in camera* only (the “Statement”).

6 **I. INTRODUCTION**

7 Exhibit PX7065 is deposition transcript of a witness employed by NOA that contains
 8 testimony discussing NOA’s confidential information. The transcript is from a deposition taken
 9 in the still-pending Federal Trade Commission (“FTC”) Part 3 administrative proceeding
 10 regarding Defendants Microsoft Corp.’s (“Microsoft”) proposed acquisition of Activision
 11 Blizzard, Inc. (“Activision”) (collectively, “Defendants”), *In the Matter of Microsoft Corp. and*
 12 *Activision Blizzard, Inc.*, before the FTC Office of Administrative Law Judges, Docket No. 9412.
 13 The transcript covers confidential business information of NOA including documents produced
 14 to the FTC in connection with the FTC’s pre-complaint investigation and in the Part 3
 15 proceeding. NOA was not a target of the FTC’s review of the proposed acquisition, nor is NOA
 16 a party to the Part 3 administrative proceeding or this federal court action.

17 Plaintiff FTC has informed NOA that it intends to introduce the entirety of PX7065 as an
 18 exhibit at the evidentiary hearing. NOA’s Statement regarding PX7065 as a hearing exhibit was
 19 filed separately today, as Dkt. No. 219. This Statement addresses only the parties’ stated intent
 20 to play portions of the videorecorded testimony at the evidentiary hearing.

21 The FTC did not designate any portion of PX7065 to be played in its case-in-chief at the
 22 evidentiary hearing. On June 21, 2023, Defendants informed NOA of their designations of
 23 testimony contained in PX7065 that they intended to play as videorecorded testimony at the
 24 evidentiary hearing. Defendants designated approximately 136 lines of testimony – fewer than
 25 six (6) pages out of the 260-page deposition transcript. In response, the FTC counter-designated
 26 approximately 155 lines of testimony – fewer than seven (7) pages. Defendants then counter-
 27 counter-designated approximately 79 more lines of testimony – fewer than 4 pages. None of the
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1 parties have indicated that they intend to use the other approximately 245 pages of PX7065 (94%
 2 of the transcript), nor any part of PX7059, at the evidentiary hearing.

3 **II. ARGUMENT**

4 NOA respectfully requests that the Court view and listen to the video recording any
 5 portion(s) of PX7065 *in camera* only, and that it seal any hearing transcript containing or
 6 describing that testimony. While the transcript is long and covers a wide swath of topics, (i) the
 7 FTC informed NOA that it does not intend to rely on any part of the transcript in its case-in-
 8 chief at the evidentiary hearing, (ii) Defendants have indicated that they intend to introduce
 9 fewer than 9 pages of testimony at the evidentiary hearing, and the FTC has counter-designated
 10 fewer than 7 additional pages of testimony in response. Thus, for over 94% of PX7065,
 11 whatever relevance the parties attach to this exhibit is heavily outweighed by the extensive
 12 confidentiality concerns discussed below, and the most exigent course is to seal the exhibit in
 13 their entirety.

14 Alternatively, NOA respectfully requests that the Court view *in camera* only and keep
 15 sealed the portions of the testimony identified in the charts below. The charts below group and
 16 categorize the testimony by the specific confidentiality topic. These charts use the same
 17 categories identified in NOA's previous filing regarding the FTC's stated intent to introduce the
 18 entirety of PX7065 as a hearing exhibit (Dkt. No. 219):

19 Category 1 (Research and Development for Future Business) contains testimony
 20 discussing Nintendo's research and development for its future business, including its potential
 21 future products. Nintendo's future product intentions are among the most sensitive trade secrets.
 22 It would be difficult to overstate the harmful competitive and economic effects of the release of
 23 information about Nintendo's future products.

24 Category 2 (Gaming Content Development) is testimony containing details of the internal
 25 processes Nintendo utilizes to develop its gaming content. As to first-party gaming content, this
 26 includes, for example, discussions of Nintendo's prioritization and allocation of resources for
 27 first-party game development, technical requirements, and performance of Nintendo's hardware,

1 and – most sensitively – forward looking discussions regarding Nintendo’s hardware, software,
 2 and marketing intentions. As to third-party gaming content, this category includes, for examples,
 3 details about the Nintendo Developer Portal, NOA’s relationships with third-party developers
 4 and publishers (both generally and as to specific entities), and terms and negotiations of third-
 5 party agreements (same). Public disclosure of information regarding these topics would result in
 6 competitors gaining insight into how Nintendo develops and curates its gaming content.

7 Category 3 (Competitive Approach) contains testimony regarding the deponents’ views
 8 of and approach to competition with Nintendo’s competitors, including target audiences, console
 9 comparisons, competitive advantages, strategic differences, and overall assessments of the
 10 competitive landscape. Public disclosure would allow competitors to learn Nintendo’s view on
 11 their own businesses and competing products and services, which would harm Nintendo’s
 12 position in the market.

13 Category 4 (Internal Discussions of LOI and Side Letter) contains testimony discussing
 14 Nintendo’s internal discussion of the December 6, 2022 agreement (“LOI”) and February 10,
 15 2023 agreement (“Side Letter”) between Nintendo and Microsoft regarding bringing *Call of Duty*
 16 titles to the Nintendo platform post-acquisition. Public disclosure would reveal Nintendo’s
 17 strategic thought process when negotiating with third-party partners, which would disadvantage
 18 Nintendo in future negotiations.

19 Category 5 (Confidential Negotiations with Microsoft regarding LOI and Side Letter) is
 20 similar to Category 4 (internal Nintendo discussions of the LOI and Side Letter), except that this
 21 testimony discusses the confidential negotiations between NOA and Microsoft regarding those
 22 agreements, including a discussion of NOA’s “usual” business terms and whether the terms of
 23 the LOI and Side Letter depart from those usual terms. As with Category 5, this Category 6
 24 contains confidential business information that Nintendo’s competitors could use to undermine
 25 Nintendo’s negotiations with third-party partners in the future.

26 Category 6 (Witness’s Understanding of LOI and Side Letter) contains testimony in
 27 which counsel for the parties to this action asked Nintendo’s witnesses – neither of whom are

1 attorneys – for their interpretation of the LOI and Side Letter. This testimony raises two
 2 concerns. First, the specific terms of the LOI and Side Letter are not public information, but the
 3 testimony reveals those specific contract terms. Disclosure of these terms will harm NOA in
 4 negotiating future contracts with third-party developers and publishers. Second, the witness's
 5 interpretation of the agreements is immaterial – the agreements speak for themselves, and only
 6 the Court can may determine their meaning. The witness's own layman's interpretation is not
 7 necessary for the Court to determine the issues before it and, in light of the significant
 8 competitive concerns discussed above, should not be part of the record unless under seal.

9 Category 7 (Confidential Business Information) contains testimony discussing NOA's
 10 corporate strategy, investment and allocation of resources, and internal decision-making
 11 processes unrelated to the other specific issues discussed above. Nintendo's implementation of
 12 its corporate strategy is confidential information that its competitors could use to undercut
 13 Nintendo's competitive position and advantages.

14 **A. PX7065 – DEFENDANTS' DESIGNATIONS**

Category	Transcript Citation(s)
Category 2 (Gaming Content Development)	(216:18-216:24); (238:11-238:17); (238:20-239:2); (239:4- 239:12); (239:14-239:16)
Category 5 (Confidential Negotiations with Microsoft regarding LOI and Side Letter)	(238:4-238:9); (238:11-238:17); (238:20-239:2); (239:4- 239:12); (239:14-239:16)
Category 6 (Witness' Understanding of LOI/Side Letter)	(238:4-238:9); (249:19-249:23); (249:25-250:4); (252:16- 252:19); (252:22-252:24)

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B. PX7065 – PLAINTIFF’S COUNTER-DESIGNATIONS

Category	Transcript Citation(s)
Category 1 (Research and Development for Future Business)	(58:7-58:10); (58:17-58:18); (133:15-134:5); (169:23-170:12); (170:13-170:22); (171:14-171:19); (172:24-173:5); (174:21-174:25); (175:3-175:8)
Category 2 (Gaming Content Development)	(22:24-23:1); (23:4-23:4); (23:22-24:1); (24:5-24:7); (24:9-24:11); (25:2-25:7); (50:17-50:23); (52:2-52:10); (52:12-52:19); (54:11-54:15); (54:18-54:18); (55:9-55:16); (58:7-58:10); (58:17-58:18); (64:20-64:23); (65:1-65:3); (65:5-65:8); (65:12-65:16); (65:18-65:20); (65:21-65:24); (66:2-66:3); (66:5-66:7); (66:10-66:18); (67:6-67:12); (67:18-67:19); (67:21-67:22); (67:24-67:25); (68:8-68:9); (68:12-68:19); (68:20-68:21); (68:23-69:2); (69:4-69:5); (69:8-69:9); (120:16-120:19); (120:22-120:23); (121:10-121:11); (121:15-121:22); (121:25-122:1); (171:14-171:19); (172:24-173:5); (174:21-174:25); (175:3-175:8); (185:9-186:8); (187:18-188:6); (188:9-188:11); (203:19-203:21); (203:23-204:6); (204:8-204:9)
Category 3 (Competitive Approach)	(79:24-79:25); (80:3-80:10); (82:23-83:3); (83:5-83:12); (84:9-84:19); (88:12-88:19); (166:14-166:17)
Category 4 (Internal Discussions of LOI and Side Letter)	(92:12-92:16); (95:19-95:22); (101:2-101:5); (101:8-101:11); (101:14-101:22); (102:9-102:11); (102:14-102:16); (102:23-102:23); (106:19-106:22); (106:25-106:25); (185:1-185:3); (185:6-185:7); (255:22-256:7)
Category 5 (Confidential Negotiations with Microsoft regarding LOI and Side Letter)	(95:19-95:22); (96:10-96:16); (105:22-105:25); (106:6-106:8); (106:11-106:12); (106:19-106:22); (106:25-106:25); (107:7-107:8); (107:19-107:24); (119:15-119:23); (120:1-120:6); (120:13-120:15); (123:17-123:22); (124:1-124:6); (126:9-126:12); (126:14-126:17); (128:18-128:21); (130:4-130:7); (132:2-132:4); (132:8-132:8); (133:10-133:12); (133:15-134:10); (134:17-134:21); (134:23-135:1); (135:2-135:2); (135:10-135:14); (136:11-136:14); (137:19-137:22); (138:24-138:25); (139:9-139:10); (140:4-140:10); (142:9-142:12); (142:17-142:18); (143:23-144:14); (150:18-150:19); (150:22-150:24); (150:25-150:25); (151:5-151:6); (151:11-151:21); (151:25-152:6); (152:8-152:8); (152:10-152:11); (155:21-156:1); (156:9-156:13); (156:16-156:18); (158:5-158:12); (160:2-160:5); (160:15-160:21); (162:20-162:23); (164:12-164:22); (165:23-166:4); (166:8-166:17); (167:13-167:17); (167:20-167:22); (168:6-168:8); (168:11-168:17); (168:20-168:20); (168:22-168:22); (169:2-169:13); (185:1-185:3); (185:6-185:7); (185:9-186:8); (187:18-188:6); (188:9-188:11); (203:19-203:21); (203:23-204:6); (204:8-204:9)

1	Category 6 (Witness's Understanding of LOI and Side Letter)	(105:22-105:25); (106:6-106:8); (106:11-106:12); (119:20- 119:23); (120:1-120:6); (120:13-120:15); (123:17-123:22); (124:1-124:6); (126:9-126:12); (126:14-126:17); (132:2- 132:4); (132:8-132:8); (133:10-133:12); (133:15-134:10); (134:17-134:21); (134:23-135:1); (135:2-135:2); (150:18- 150:19); (150:22-150:24); (150:25-150:25); (151:5-151:6); (151:11-151:21); (151:25-152:6); (152:8-152:8); (152:10- 152:11); (158:5-158:12); (160:2-160:5); (160:15-160:21); (162:20-162:23); (164:12-164:22); (165:23-166:4); (166:8- 166:13); (167:13-167:17); (167:20-167:22); (168:6-168:8); (168:11-168:17); (168:20-168:20); (168:22-168:22); (169:2- 169:13)
8	Category 7 (Confidential Business Information)	(63:3-63:5); (76:3-76:6); (76:8-76:9); (79:1-79:3); (79:5-79:5)

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12 **C. PX7065 – DEFENDANTS’ COUNTER-COUNTER-DESIGNATIONS**

Category	Transcript Citation(s)
Category 2 (Gaming Content Development)	(23:7-23:15); (23:18-23:20); (24:12-24:22); (204:11-204:15)
Category 5 (Confidential Negotiations with Microsoft regarding LOI and Side Letter)	(204:11-204:15); (237:21-237:25); (238:2-238:2)
Category 7 (Confidential Business Information)	(75:23-76:2)

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1 **D. PX7065 – ALL DESIGNATIONS COMBINED (FOR REFERENCE)**

2 For the ease of the Court's evaluation and the parties' preparation of the testimony
 3 discussed herein, the chart below contains in one chart all of the testimony cited in Charts A
 4 through C:

Category	Transcript Citation(s)
Category 1 (Research and Development for Future Business)	(58:7-58:10); (58:17-58:18); (133:19-134:5); (169:23-170:12); (170:13-170:22); (171:14-171:19); (172:24-173:5); (174:21-174:25); (175:3-175:8)
Category 2 (Gaming Content Development)	(22:24-23:1); (23:4-23:4); (23:7-23:15); (23:18-23:20); (23:22-24:1); (24:5-24:7); (24:9-24:11); (24:12-24:22); (25:2-25:7); (50:17-50:23); (52:2-52:10); (52:12-52:19); (54:11-54:15); (54:18-54:18); (55:9-55:16); (58:7-58:10); (58:17-58:18); (64:20-64:23); (65:1-65:3); (65:5-65:8); (65:12-65:16); (65:18-65:20); (65:21-65:24); (66:2-66:3); (66:5-66:7); (66:10-66:18); (67:6-67:12); (67:18-67:19); (67:21-67:22); (67:24-67:25); (68:8-68:9); (68:12-68:19); (68:20-68:21); (68:23-69:2); (69:4-69:5); (69:8-69:9); (120:16-120:19); (120:22-120:23); (121:10-121:11); (121:15-121:22); (121:25-122:1); (171:14-171:19); (172:24-173:5); (174:21-174:25); (175:3-175:8); (185:9-186:8); (187:18-188:6); (188:9-188:11); (203:19-203:21); (203:23-204:6); (204:8-204:9); (204:11-204:15); (216:18-216:24); (238:11-238:17); (238:20-239:2); (239:4-239:12); (239:14-239:16)
Category 3 (Competitive Approach)	(79:24-79:25); (80:3-80:10); (82:23-83:3); (83:5-83:12); (84:9-84:19); (88:12-88:19); (166:14-166:17)
Category 4 (Internal Discussions of LOI and Side Letter)	(92:12-92:16); (95:19-95:22); (101:2-101:5); (101:8-101:11); (101:14-101:22); (102:9-102:11); (102:14-102:16); (102:23-102:23); (106:19-106:22); (106:25-106:25); (185:1-185:3); (185:6-185:7); (255:22-256:7)

1	Category 5 (Confidential Negotiations with Microsoft regarding LOI and Side Letter)	(95:19-95:22); (96:10-96:16); (105:22-105:25); (106:6- 106:8); (106:11-106:12); (106:19-106:22); (106:25-106:25); (107:7-107:8); (107:19-107:24); (119:15-119:23); (120:1- 120:6); (120:13-120:15); (123:17-123:22); (124:1-124:6); (126:9-126:12); (126:14-126:17); (128:18-128:21); (130:4- 130:7); (132:2-132:4); (132:8-132:8); (133:10-133:12); (133:15-134:10); (134:17-134:21); (134:23-135:1); (135:2- 135:2); (135:10-135:14); (136:11-136:14); (137:19-137:22); (138:24-138:25); (139:9-139:10); (140:4-140:10); (142:9- 142:12); (142:17-142:18); (143:23-144:14); (150:18-150:19); (150:22-150:24); (150:25-150:25); (151:5-151:6); (151:11- 151:21); (151:25-152:6); (152:8-152:8); (152:10-152:11); (155:21-156:1); (156:9-156:13); (156:16-156:18); (158:5- 158:12); (160:2-160:5); (160:15-160:21); (162:20-162:23); (164:12-164:22); (165:23-166:4); (166:8-166:17); (167:13- 167:17); (167:20-167:22); (168:6-168:8); (168:11-168:17); (168:20-168:20); (168:22-168:22); (169:2-169:13); (185:1- 185:3); (185:6-185:7); (185:9-186:8); (187:18-188:6); (188:9- 188:11); (203:19-203:21); (203:23-204:6); (204:8-204:9); (204:11-204:15); (237:21-237:25); (238:2-238:2); (238:4- 238:9); (238:11-238:17); (238:20-239:2); (239:4-239:12); (239:14-239:16)
14	Category 6 (Witness's Understanding of LOI and Side Letter)	(105:22-105:25); (106:6-106:8); (106:11-106:12); (119:20- 119:23); (120:1-120:6); (120:13-120:15); (123:17-123:22); (124:1-124:6); (126:9-126:12); (126:14-126:17); (132:2- 132:4); (132:8-132:8); (133:10-133:12); (133:15-134:10); (134:17-134:21); (134:23-135:1); (135:2-135:2); (150:18- 150:19); (150:22-150:24); (150:25-150:25); (151:5-151:6); (151:11-151:21); (151:25-152:6); (152:8-152:8); (152:10- 152:11); (158:5-158:12); (160:2-160:5); (160:15-160:21); (162:20-162:23); (164:12-164:22); (165:23-166:4); (166:8- 166:13); (167:13-167:17); (167:20-167:22); (168:6-168:8); (168:11-168:17); (168:20-168:20); (168:22-168:22); (169:2- 169:13); (238:4-238:9); (249:19-249:23); (249:25-250:4); (252:16-252:19); (252:22-252:24)
21	Category 7 (Confidential Business Information)	(63:3-63:5); (75:23-76:2); (76:3-76:6); (76:8-76:9); (79:1- 79:3); (79:5-79:5)

III. APPLICABLE LEGAL STANDARD

Non-parties receive special deference when issues of confidentiality are considered. *See United States v. Bazaarvoice, Inc.*, 2014 WL 11297188, at *1 (N.D. Cal. Jan. 21, 2014) (granting motion to seal third-party trial exhibits, noting that disclosure could “cause damage to third parties if made public” and would “chill investigations in the future where third-party documents are essential”).

While the public has a right of access to the Court’s files, “[i]n the case of non-dispositive motions . . . the presumption in favor of public access does not apply with equal force.” *Prosurance Grp., Inc. v. Liberty Mut. Grp., Inc.*, 2011 WL 704456, at *1 (N.D. Cal. Feb. 18, 2011) (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). “Thus, a showing of good cause will suffice to justify sealing material attached to non-dispositive motions.” *Id.* Courts have applied the good cause standard when reviewing motions related to a preliminary injunction. *See Jam Cellars, Inc. v. Wine Grp. LLC*, 2020 WL 5576346, at *2 (N.D. Cal. Sept. 17, 2020).

Under Fed. R. Civ. P. Rule 26(c), “a trial court has broad discretion to permit sealing of court documents for, among other things, the protection of ‘a trade secret or other confidential research, development, or commercial information.’ Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit adopted the definition of “trade secrets” set forth in the Restatement of Torts, finding that ‘[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.’” *Fitzhenry-Russell v. Keurig Dr. Pepper Inc.*, 345 F. Supp. 3d 1111, 1120 (N.D. Cal. 2018) (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)).

Good cause exists to file NOA's information under seal because the information consists of NOA's confidential information, the disclosure of which would cause competitive injury. Courts have found disclosure of confidential information that could harm a party's competitive standing to be a compelling reason – a standard *higher* than the one required here – to seal

1 exhibits. *See Snapkeys, Ltd. v. Google LLC*, 2021 WL 1951250, at *3 (N.D. Cal. May 14, 2021).
 2 Special consideration should be taken since these depositions were taken under the Protective
 3 Order of the FTC’s Administrative Law Judge. *See Finisar Corp. v. Nistica, Inc.*, 2015 WL
 4 3988132, at *4 (N.D. Cal. June 30, 2015) (granting motion to seal for transcripts designated
 5 Highly Confidential-Attorneys’ Eyes Only pursuant to a Stipulated Protective Order because
 6 testimony contained confidential, trade secret, and proprietary information related to products
 7 and business practices).

8 The designations referenced above contain NOA’s confidential business information,
 9 which the courts in this district have defined broadly. *See In re Qualcomm Antitrust Litig.*, 2022
 10 WL 4137580, at *2 (N.D. Cal. Aug. 26, 2022) (“‘confidential business information’ in the form
 11 of ‘license agreements, financial terms, details of confidential licensing negotiations, and
 12 business strategies’ satisfies the ‘compelling reasons’ standard.”); *Arista Networks, Inc. v. Cisco*
 13 *Sys.*, 2017 WL 6043303, at *3-4 (N.D. Cal. Nov. 28, 2017) (finding that disclosure of internal
 14 assessments of products and development strategies would result in competitive harm and thus
 15 the information is sealable); *Lenovo (United States) Inc. v. IPCOM GmbH & Co., KG*, 2022 WL
 16 2313948, at *2 (N.D. Cal. June 28, 2022) (ruling that there are compelling reasons to seal
 17 information relating to the specific details and substance of licensing negotiations); *Am.*
 18 *Automobile Ass’n of N. Cal., Nev., & Utah*, 2019 WL 1206748, at *2 (N.D. Cal. Mar. 14,
 19 2019) (finding compelling reasons to seal personally identifiable information, “including names,
 20 addresses, phone numbers, and email addresses”); *Hadley v. Kellogg Sales Co.*, 2018 U.S. Dist.
 21 LEXIS 224314, 2018 WL 7814785, at *2 (N.D. Cal. Sept. 5, 2018) (finding “compelling
 22 reasons” to seal information providing insight into “business strategies and internal decision
 23 making”).

24 When the public release of documents could give competitors an unfair advantage in the
 25 development or marketing of rival products, courts have sealed those documents. *Exeltis USA*
 26 *Inc. v. First Databank, Inc.*, 2020 WL 2838812, at *2 (N.D. Cal. June 1, 2020). Here, public
 27 disclosure of this information would provide Nintendo’s competitors with confidential data such

1 as Nintendo's business operations, strategic thinking, competitive analyses, product
2 development, and third-party negotiations. The resulting competitive harm would be immense
3 and therefore the harm cannot be avoided through less restrictive alternatives .

4 **IV. CONCLUSION**

5 For the foregoing reasons, Non-Party NOA respectfully requests that the Court listen to
6 and view any and all portions of the testimony transcribed in PX7065 *in camera* only.
7 Alternatively, the NOA respectfully requests that the Court listen to and view the designated,
8 counter-designated, and counter-counter-designated portions of the testimony identified in the
9 charts above *in camera* only.

10 Dated: June 26, 2023

VENABLE LLP

11
12 By: /s/ Steven E. Swaney
13 Steven E. Swaney
14 Leonard L. Gordon (pro hac vice)
15 Benjamin P. Argyle (pro hac vice)
16 Attorneys for Non-Party Nintendo of
17 America Inc.
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